Supreme Court, U. S.
FILED
JUN 23 1972
MICHAEL RODAK, JR., CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

RONALD NOVAK, INDIVIDUALLY And
In Behalf Of All Others
Similarly Situated, And FRED CRUZ,
Petitioners

V.

DR. GEORGE J. BETO, Director
Texas Department of Corrections,
Respondent

RESPONSE IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION NOT PRINTED
REPLY BRIEF NOT PRINTED

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General

Attorneys for Respondent

P.O. Box 12548, Capitol Station
Austin, Texas 78711

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

Now comes Dr. George J. Beto, Director of the Texas Department of Corrections, Respondent herein and files this response in reply to Petitioner's Petition for Writ of Certiorari heretofore filed herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment affirmed in part and reversed in part the order of the United States District Court below is reported at 453 F.2d 661. The opinions of judges of the United States Court of Appeals for the Fifth Circuit on rehearing En Banc is reported at 456 F.2d 1303. The opinion of the United States District Court for the Southern District of Texas is reported at 320 F.Sup. 1206. Copies of these opinions also appear in the appendix to Petitioners' Petition for Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 9, 1971. Petitioners' Motion for Rehearing and Rehearing En Banc, was denied on March 8, 1972. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1). Accordingly, the jurisdictional requirements would appear to be satisfied, although Respondent refutes Petitioners' contention that any right guaranteed by the Constitution of the United States has been denied him.

QUESTIONS PRESENTED

The question presented as stated by the Petitioners is wholly unacceptable to the Respondent as it is pregnant with assumptions of fact that are not supported by the record. Accordingly, the Respondent will restate the questions presented on this appeal.

(1) Whether the conditions of solitary confinement in Texas Prisons constitutes cruel and unusual punishment when solitary is imposed for violation of the Texas Department of Corrections Rules.

(2) Whether the action of the Texas Department of Corrections has rendered this cause of action moot.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States and are adequately set forth in Petitioners' Brief and therefore will not be included herein.

STATEMENT OF THE CASE AND FACTS AND AUTHORITIES

Petitioners are inmates of the Texas Department of Corrections. In the Courts below they challenge the constitutionality, under 42 U.S.C. Section 1983, of various aspects of the Texas Prison system. The only issue that is presented for review by this Court is the issue concerning the conditions of solitary confinement in the Texas Department of Corrections and whether or not those conditions are such that they violate the cruel and unusual punishment provisions of the Eighth Amendment of the United States Constituion.

The statement of the facts contained in Petitioners' brief does not accurately or completely present the circumstances as they were developed in this cause. Accordingly, Respondents submit herewith their version of the conditions in solitary in the Texas Prison System as is

reflected by the record. (Citations to the record are herein designated by the references S.F. I and S.F. II. The references S.F. I is a citation to the court reporter's transcript of the December 9, 1969, hearing and the reference S.F. II is a citation to the court reporter's transcript of the August, 1970, hearing.) The record shows that TDC solitary cells are clean and sanitary (S.F. I., 477,540-541); that only a small amount of light enters the cells (S.F. I. 76, 481, 527, 615-616)(the cells are dark, but not "pitch black") that inmates in solitary are fed a bread and water diet with one full meal every 72 hours (S.F. I. 517,518); that the receive daily medical examinations (S.F. I. 81, 521, 525, 546) and are bathed every two days (S.F. I. 21). Their weight is charted when they enter the cells and they are weighed twice a week to make certain that their weight does not decline too

rapidly on the bread and water diet (S.F. I. 528,556,613).

Inmates are furnished with tooth paste and toothbrush (S.F. I. 529, 56); a hospital gown (S.F. I. 515)(sometimes a "T" shirt and shorts)(S.F. I. 542, 543); two blankets and a steel bunk (S.F. I. 515).

The cells are equipped with a toilet that the inmates can flush for themselves as needed (S.F. I. 72, 644); a drinking fountain (S.F. I. 515); and the inmate is furnished with toilet paper (S.F. I. 529).

Cooling and heating ventilation is basically the same as in other prison cells (S.F. I. 515,526,616) except that a solid door is closed in front of the cells (S.F. I. 514, 515, 540, 541, 615). Inmates in solitary can talk back and forth with other inmates in adjoining solitary cells through the ventilation system (S.F. I. 76, 307-308, 526).

Fifteen days in a row in solitary confinement is the harshest punishment which is ever assessed in the TDC (S.F. I. 518-523). Terms in solitary vary with the severity of the offense, the record of the inmate, the degree to which he appears to be recalcitrant, the frequency with which he violates prison rules, the extent to which other more lenient treatment has been tried and has failed, etc. (S.F. I. 548). In the case of infrequent violators who commit minor infractions of prison rules, only minor penalties (or sometimes none at all) are assessed (S.F. I., 504, 505, 508, 509). Plaintiff Novak has chosen solitary over lessor punishment (S.F. I., 106). All sentences to solitary confinement are for indefinite periods not to exceed fifteen days at any one time (S.F. I. 516-518, 521).

Following a fifteen day term in solitary confinement, the commitment may be repeated

after a two day interval (S.F. I. 519). However, when it becomes clear that a repetition of solitary confinement is having no effect in changing the inmates attitude, or at least getting him to co-operate sufficiently to avoid disturbing efforts to rehabilitate other inmates - or, if at any time, solitary appears to be endangering an inmate's health - the inmate will be immediately removed from solitary and placed in the hospital or clinical block of the prison for diagnosis and treatment (S.F. I. 520-522). Psychiatrists are available to consult with prison officials and examine individual inmates before, during and after the imposition of solitary confinement (S.F. I. 482, 612). They do not routinely examine inmates in this connection because of the lack of available staff (S.F. I. 545, 560). Solitary confinement is at present the most severe form of punishment used in

the Texas Department of Corrections. It is reserved for recalcitrant, often incorrigible inmates, and its use is frequently justified by a need to preserve order and to prevent chaos. Dr. Beto, confronted with violent, hardened individuals, who have chosen to disregard the laws of the State of Texas and the regulations of the prison system has, at times no other alternative, save solitary by which to maintain order and protect the lives of other inmates.[1] The undeniable fact is that all any inmate prisoner has to do to keep out of solitary is to obey

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1. The inmate population at the Texas Department of Corrections as of the writing of this brief is 16,511. At the time of the hearing in the District Court below, inmate population was in the neighborhood of 13,000. The Texas Department of Corrections is the second largest prison in the United States and is second only to California.

the prison regulations. There can be no question but that solitary confinement is a necessary function of prison administration. Without it, chaos would result and the inmates would be running the institution.

It is on these facts that the United States District Court below and the United States Court of Appeals for the Fifth Circuit held that solitary confinement as administered in the Texas Department of Corrections does not violate the Eighth Amendment of the United States Constitution.

Petitioner stated that the panel on the Court of Appeals was "deeply troubled by the peculiar harsh conditions of the Texas system of solitary confinement." His biggest complaints are two-fold: (1) The total darkness conditions of the cells, (2) The feeding of only two slices of bread daily.

SUGGESTION OF MOOTNESS

Respondent moves to dismiss the Petition for Writ of Certiorari for the reason that the primary conditions complained of by Petitioner i.e., the total darkness condition of the cells in solitary and the feeding of the two slices of bread a day, have now changed and today the cells are adequately lighted and the inmates in solitary are fed the normal institution meals on the standard ration and menu of the day for the institution with the exception that no meat of any kind is furnished.

On the 9th day of June, 1972, the Texas Department of Corrections in keeping with its policy of revising its ever evolving standards at the institution issued a policy statement

which radically changed the conditions in solitary confinement.[2]

The Texas Department of Corrections has for sometime been experimenting with the furnishing of light and three meals a day to inmates who are isolated in solitary. The results of that study has convinced the department that it is in the best interest of the inmates and of

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2. "50.92322 Lighting

"The solid door of the solitary cell will be left open. If an inmate becomes noisy and creates a disturbance the door will be closed. On some units the open door creates a security problem and it is not practical to utilize this procedure. If this occurs, artificial lighting will be provided during the normal daylight hours."

"50.92333 Diet

"50.92331 Inmates in solitary confinement will be fed twice a day a hot meal consisting of vegetables from the regular serving line and are to be given unlimited drinking water.

the Texas Department of Corrections to revise its rules of solitary confinement.

In view of the fact that the Texas Department of Corrections has substantially changed the conditions of solitary confinement which was the principal basis of the suit below, it appears that the controversy which led the Petitioner to seek certiorari to this Court has been settled. Thus the cause which was litigated below is now moot.

CONCLUSION

The Appellee respectfully submits that because of the aforesaid, any judgment which this Court might have rendered in this cause would be pointless, and therefore Respondent respectfully moves that this Petition for Writ of Certiorari be dismissed for mootness or in the alternative that certiorari be denied.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General

Attorneys for Respondent

P.O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, attorney for Respondent, do hereby certify that a copy of the above and foregoing Response In Opposition To Granting Of Petition For Writ Of Certiorar To The United States Court of Appeals For The Fifth Circuit has been deposited in the United States Mail, postage prepaid, on this the _____ day of June, 1972, to the following address: William Bennett Turner and Alice Daniel, 12 Geary Street, San Francisco, California, 94108.

GILBERT J. PENA
Assistant Attorney General